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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-675

ALVIN MICHAEL MAHER, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner, Alvin Michael Maher, petitions this Court for a writ of certiorari to review the Judgment and Decision of the United States Court of Appeals for the Fourth Circuit affirming the judgment of conviction against petitioner.

OPINIONS BELOW

The Opinion of the Court of Appeals (Appendix A, infra, p. 1a) is reported at —— F.2d —— (1978). There was no Opinion of the District Court.

JURISDICTION

The Judgment of the Court of Appeals was entered on August 23, 1978. (Appendix A, *infra,* p. 1a.) Petitioner's petition for a rehearing was denied on September 22, 1978. (Appendix B, *infra,* p. 15a). On October 4, 1978, the Court of Appeals stayed the issuance of the mandate pending application to the Supreme Court for a writ of certiorari. The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether a specific intent to defraud is an essential element of a criminal prosecution under the Criminal False Claims Act (18 U.S.C. § 287) where under the Civil False Claims Act (31 U.S.C. § 231) specific intent to defraud is a required element and where both statutes have a common statutory genealogy and proscribe false, fictitious and fraudulent claims in identical terms.

2. Whether the Criminal False Claims Act (18 U.S.C. § 287) requires that the claim submitted be material and, if so, whether materiality incorporates the element of an intent to defraud into 18 U.S.C. § 287.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The provisions of the Fifth Amendment to the United States Constitution, 18 U.S.C. § 287, 31 U.S.C. § 231, and the Revised Statutes §§ 3490, 5438 are set forth in Appendix C, *infra,* p. 16a.

STATEMENT

This case presents for review the decision of the Court of Appeals for the Fourth Circuit that a specific intent to defraud is not an element of the crime defined in 18 U.S.C. § 287. This is an issue of first impression, previously undecided by any court.

Petitioner Alvin Michael Maher was charged with violating the Criminal False Claims Act, 18 U.S.C. § 287 by an indictment which alleged that he willfully caused the presentation of false and fictitious claims to the Department of the Army. The defense asserted an absence of any intent to defraud in the submission of these claims to the government. Petitioner requested the trial court to instruct the jury that, in order to find the defendant guilty, it must find that he had an intent to defraud. A proffered instruction was refused.

After two hours of deliberation, the jury sent a message to the Court inquiring whether "criminal intent to defraud was a primary consideration for guilt or innocence." The Court responded, over the objection of petitioner's counsel, that "[c]riminal intent to defraud may or may not be a primary consideration for guilt or innocence . . . Fraud is only one of the three things he may have had a consciousness of what he was doing and what was going on. It could be false, as that term is defined for you, and fraudulent, as that term was defined for you, or fictitious." The jury then returned with a verdict convicting the petitioner on the eleven counts which were submitted to it.

On appeal pursuant to 28 U.S.C. § 1291, the Court of Appeals for the Fourth Circuit held that an intent to defraud is not an essential element for conviction under 18 U.S.C. § 287.

REASONS FOR GRANTING THE WRIT

1. The import of the decision by the Court of Appeals for the Fourth Circuit is that it is easier for the government to deprive a man of his liberty than it is to deprive him of his money. This assessment is mandated by the Fourth Circuit's refusal to recognize that the standard required for a civil monetary recovery for false claims under 31 U.S.C. § 231 is a sine qua non for prosecution under 18 U.S.C. § 287. The majority rule is that an intent to defraud is a requisite element in a civil suit by the government under 31 U.S.C. § 231.[1]

Cases construing the Civil False Claims Act are relevant to the interpretation of the Criminal False Claims Act for two reasons. First, the statutes utilize, in relevant part, identical language, i.e. "make . . . or present . . . any claim . . . *knowing such claim to be false, fictitious, or fraudulent* . . .". Secondly, these two statutes

[1] *United States* v. *Ekelman & Associates*, 532 F.2d 545 (6th Cir. 1976); *United States* v. *Aerodex, Inc.*, 469 F.2d 1003, 1007 (5th Cir. 1972); *United States* v. *Mead*, 426 F.2d 118, 122 (9th Cir. 1970); *United States* v. *Ueber*, 299 F.2d 310, 314-315 (6th Cir. 1962); *United States* v. *Priola*, 272 F.2d 589, 594 (5th Cir. 1959); *United States* v. *National Wholesalers*, 236 F.2d 944, 950 (9th Cir. 1956); *United States* v. *Hangar One, Inc.*, 406 F.Supp. 60, 70 (N.D. Ala. 1975); *United States* v. *Lazy F.C. Ranch*, 324 F.Supp. 698, 700 (D. Idaho 1971); *United States* v. *Sawin*, 243 F.Supp. 744, 745 (S.D. Iowa 1965); *Woodbury* v. *United States*, 232 F. Supp. 49, 54-55 (D. Ore. 1964); *United States* v. *Schmidt*, 204 F. Supp. 540, 543 (E.D. Wis. 1962); *United States* v. *Goldberg*, 158 F.Supp. 544, 548 (E.D. Pa. 1958); *United States* v. *Park Motors*, 107 F.Supp. 168, 176 (E.D. Tenn. 1952).

have evolved from the same statute, Act of March 21, 1863, 12 Stat. 696, C. 67.[2]

Yet, despite the inherent and obvious relationship between the civil and criminal statutes, the Fourth Circuit rejected petitioner's analogy to the civil statute, stating:

> Unlike § 231, § 287 requires proof of a criminal act, rather than proof of a civil wrong . . . Under § 287, the government must prove beyond a reasonable doubt that the defendant performed forbidden acts with a criminal intent. The prohibition of the statute is absolute in that the defendant's liberty is at stake. Under § 231, the government is empowered to enforce the underlying civil duty to submit to the government only valid claims for payment by bringing an action for imposition of civil penalties. The nature of the proceedings, the standards of proof, and the defendant's interests at stake are wholly different under these two statutes, and in construing § 287 we do not find either authority or persuasion in defendant's analogy to § 231." Appendix A, p. 13a.

The Fourth Circuit Court thus acknowledged the significance of the different degrees of interests involved in these statutes. The criminal statute, as the three-year sentence demonstrates, affects the liberty of the defendant while the civil statute merely impacts on his wallet. Nevertheless, the Court failed to apply the

[2] A detailed statutory history was set forth by this Court in *United States* v. *Bornstein*, 423 U.S. 303 (1976). The original statute was subsequently re-enacted, the criminal provisions becoming § 5438, the civil section becoming §§ 3490-3494. The civil section merely provided that anyone who committed any of the acts prohibited by § 5438, the criminal statute, would be civilly liable to the United States. The criminal provisions of § 5438 were eventually altered and codified in 18 U.S.C. §§ 287 and 1001.

majority rule which requires an intent to defraud for civil recovery in its interpretation of the companion criminal statute. The irony of this holding is that the Court makes the government's burden for incarceration easier than for a suit for the recovery of money. Such a holding violates every principle of justice and fairness basic to the American concept of liberty and due process of law as guaranteed by the Fifth Amendment to the Constitution.

"The due process clause of the Fifth Amendment is essentially a recognition of the principles of justice and fundamental fairness in a given set of circumstances." *Honeywell, Inc.* v. *Metz Apparatewerke,* 509 F.2d 1137, 1143 (7th Cir. 1975). The conviction of the petitioner cannot be allowed to stand under these circumstances.

2. Due process also requires that criminal statutes be strictly construed. *United States* v. *Chappell,* 292 F.Supp. 494 (C.D.Cal. 1968). However, the Fourth Circuit, by construing the Criminal False Claims Act to require less than other courts have required under the Civil False Claims Act, has not only ignored this time-honored principle, but has actually contravened it by reading the statute broadly.

Indeed, the interpretation of this statute by the Fourth Circuit violates the admonition of the Court in *United States* v. *Bornstein,* 423 U.S. at 313 n.8:

> "This Court has noted that in construing § 5438 [the predecessor statute of § 287] we are actually construing the provisions of a criminal statute. Such provisions must be carefully restricted, not only to their literal terms but to the evident purpose of Congress in using those terms, particularly where they are broad and susceptible to numerous definitions.'"

The purpose of Congress in enacting § 5438 and its progeny was to combat *fraud* against the government. *See* Petitioner's argument, *infra,* ¶ 5, pp. 7-9. Therefore, conviction under 18 U.S.C. § 287 must require proof of an intent to defraud.

3. The decision of the Court of Appeals also conflicts with both the district court's opinion and the government's position in the case of *United States* v. *Winchester,* 407 F.Supp. 261 (D.Del. 1975). In *Winchester,* the defendant disputed the government's interpretation of the type of claim falling within the purview of 18 U.S.C. § 287. The government attempted to support its contention by referring to cases brought under the civil sections of the False Claims Act as an aid to the interpretation of the criminal statute. The district court accepted the government's reasoning, stating that the similar

> "*statutory genealogy lends support to the Government's contention that cases brought under the civil branch of the False Claims Act are relevant to the interpretation of the criminal branches* insofar as the civil cases rely upon incorporated criminal provisions." *United States* v. *Winchester,* 407 F.Supp. 261, 272 (D.Del. 1975) (Emphasis added).

Thus, whereas in this case the Fourth Circuit explicitly rejected any analogy to the Civil False Claims Act as an aid to the interpretation of the Criminal False Claims Act, both the government and the district court took the position in *Winchester* that cases interpreting the civil aspects of the False Claims Act were relevant to the interpretation of the Criminal False Claims Statute.

4. The issue in this case, whether an intent to defraud is an element of 18 U.S.C. § 287, has yet to be addressed by any Court outside of this case. Section 287 has not previously been a widely utilized statute. However, we suggest that since this statute will see increasing use by prosecutors in the future, it is important that this issue be settled by this Court.

5. The decision in this case by the Court of Appeals for the Fourth Circuit ignores the rule enunciated by this Court in *Morissette* v. *United States,* 342 U.S. 246 (1952). Indeed, the Fourth Circuit's opinion does not even address the principles enunciated by that case although they were raised in petitioner's brief before that Court.

This Court, in the *Morissette* case, established that the omission of the element of intent from a statutory crime does not eliminate it as a requirement for conviction absent evidence of Congressional intent to do so. Therefore, if an act merely "adopt[s] into federal statutory law a concept of crime already so well defined in common law" all the common law elements are incorporated into the statute. Therefore, absent evidence of congressional intent to dispense with the common law, section 287 of Title 18, United States Code, must be read in conjuction with the common law.

It is well established that common law fraud, in both its criminal and civil aspects, required an intent to defraud as one of its essential elements. *United States* v. *Mead,* 426 F.2d 118, 123 n. 4 & 5 (9th Cir. 1970); *United States* v. *Park Motors,* 107 F.Supp. 168, 175-176 (E.D.Tenn. 1952). *See also Arlington Trust Co.* v. *Hawkeye Security Insurance Company,* 301 F. Supp. 854, 858 (E.D.Va. 1969).

It is also evident that Congress did not intend to dispense with the common law element of intent to defraud. To the contrary, according to the sponsors of the original False Claims Act, the Act was adopted "for the purpose of punishing and preventing . . . *frauds.*" *Cong. Globe,* 37th Cong., 3d Sess, 952 (remarks of Senator Howard), quoted in *United States* v. *Bornstein,* 423 U.S. 303, 309 n.5 (1976). (emphasis added.) The Supreme Court repeated this legislative purpose in *United States* v. *Bornstein,* observing that "[t]he Act was originally aimed principally at stopping the massive *frauds* perpetrated by large contractors during the Civil War . . . 'We think the chief purpose of the [Act's civil penalties] was to provide for restitution to the government of money taken from it by *fraud*' . . .". 423 U.S. at 309, 314. (emphasis added). Accordingly, the Sixth Circuit has held that the gravamen of an action under the False Claims Act (31 U.S.C. § 231) is "intentional fraud." *United States* v. *Ekelman & Associates,* 532 F.2d 545, 548 (6th Cir. 1976). Given this history, it is quite clear that the False Claims Act, in both its criminal and civil aspects, sought to protect the government from fraudulent claims. As Congress has not expressed any intent to the contrary, these statutes incorporate the elements required for fraud at common law, including an intent to defraud.

6. The decision of the Fourth Circuit also conflicts with another case decided by that same Court, *United States* v. *Snider,* 502 F.2d 645 (4th Cir. 1974). In *Snider,* the Court held that materiality is an element of 18 U.S.C. § 287 and that "[i]mplicit within the utilization of the materiality standard under 287 and 1001 is the notion that *the criminal intent necessary under*

the statute includes not only an intention to make the statement but also an intention to deceive or mislead the person or agency to whom it is proffered." United States v. Snider, supra, at 652 n. 12 (emphasis added).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Published

No. 77-2471

UNITED STATES OF AMERICA, *Appellee*,

v.

ALVIN MICHAEL MAHER, *Appellant*.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Albert V. Bryan, Jr., District Judge.

Argued May 5, 1978 Decided August 23, 1978

Before BUTZNER and HALL, Circuit Judges, and NORTHROP, District Judge.*

Plato Cacheris (Larry S. Gondelman, Hundley & Cacheris on brief) for Appellant; Theodore S. Greenberg (Joseph A. Fisher, III, Assistant United States Attorneys, William B. Cummings, United States Attorney on brief) for Appellee.

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* Chief Judge of the United States District Court for the District of Maryland, sitting by designation.

HALL, Circuit Judge:

Defendant, Alvin Michael Maher, appeals his criminal conviction on eleven counts of filing false, fictitious, or fraudulent claims with the United States government in violation of the False Claims Act, 18 U.S.C. § 287. The primary issue presented in this appeal is whether the district court properly instructed the jury that under § 287 the criminal intent essential for conviction is not limited to a specific intent to defraud. At trial, the defendant conceded the basic facts of the government's case but maintained he was innocent because he acted without a specific intent to defraud the government. The district court refused to instruct the jury that proof of such a singular purpose was essential for conviction and, instead, instructed the jury that if the defendant caused false or fictitious or fraudulent claims to be submitted to the government, knowing them to be false or fictitious or fraudulent, with a specific intent to violate the law or with a consciousness that what he was doing was wrong, he should be found guilty. The defendant made timely objection to this instruction and to the court's refusal to give his proffered instructions which set forth his theory of defense. We hold that the district court properly instructed the jury and, therefore, affirm.

At trial, the government presented evidence showing that, during the year in which defendant was promoted from vice-president to president of his corporate employer, he caused false vouchers to be submitted to an agency of the federal government requesting payments totalling approximately $68,000 more than should have been paid to his employer under its contracts with that agency. The defendant contended that he did so with no intent to cheat the government or to gain unfair advantage for himself or his company.

During the time in question, defendant worked for General Environments Corporation ("GEC"), which tested

equipment and conducted experiments for various commercial and government clients. GEC's contracts with these clients could be categorized as either "fixed-price" contracts or "time-and-materials" contracts, depending upon the manner in which GEC was to be paid for its work. Under its "fixed-price" contracts, GEC agreed to perform experiments for a certain amount and to bill periodically on the basis of percentage of completion. Under its "time-and-materials" contracts, GEC agreed to perform experiments for a price *not to exceed* a certain amount and to bill periodically on the basis of the amount of labor and materials actually employed in the experiments up to the date of billing. According to the defendant's theory of defense, it was GEC's practice, at least for its contracts with government clients, to stop work on an experiment and seek additional funding from the client anytime GEC's costs met or exceeded its contract price. This practice was followed for such "cost overruns" under both "fixed-price" contracts and "time-and-materials" contracts.

During 1972, one of GEC's government clients was the Mobility Equipment Research and Development Center ("MERDC") of the Department of the Army of Fort Belvoir, Virginia. GEC and MERDC entered into various "time-and-materials" contracts most of which required GEC to conduct several experiments, or "tasks," with separate maximum prices allocated to each task. The hourly rate to be billed by GEC included its overhead and profit and varied according to the classification of labor utilized for each task. GEC billed MERDC monthly for work on these "time-and-materials" contracts. Its monthly billings were prepared by the company bookkeeper based upon time sheets which were filled out and signed by the GEC employees who worked on the MERDC contracts.

In 1972 the defendant became president of GEC. During that year, before and after his promotion, whenever the

bookkeeper submitted MERDC billings to the defendant for his approval, he instructed her to change them to reflect more hours than were shown on the employees' time sheets. She made the billing changes that he specified, prepared new time sheets to conform to those billing changes, traced over the employees' signatures on the new time sheets and destroyed the original ones. The defendant told her these changes were necessary because the employees did not know to which contract they should charge their hours and that their signatures had to be traced because there was not time to have the employees sign the revised time sheets. Three GEC project managers, whose time sheets had been altered, testified that, in fact, they knew on which contracts they were working and that they recorded hours on their time sheets according to time spent working on those contracts. They said they were never told that they made errors on their time sheets. The defendant testified that no one in the government knew GEC was billing for the fictitious hours and that he did not discuss his practice of having hours changed on company time sheets with anyone at GEC. Approximately 5,300 fictitious hours, representing $68,000 in false claims, were billed on these MERDC contracts as a result of the defendant's instructions to the bookkeeper. The bookkeeper testified that the practice of changing time sheets ended when defendant left GEC in November, 1973.

Defendant admitted giving these instructions but maintained he was innocent because he acted for a legitimate business purpose and without a motive to defraud the government. He testified that he knew the MERDC contracts were to be paid at an hourly rate for work actually performed, but nevertheless thought they should be billed on the same basis as "fixed-price" contracts, that is, if he considered work on a MERDC task to be one half complete, he should have the bookkeeper bill one half of the maximum

price allocated to that task regardless of the amount of labor actually employed.[1]

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[1] The court examined the defendant before the jury as follows:

THE COURT: Mr. Maher, suppose that you had a ceiling on a task of $80,000. It turned out that you could do it for time and materials for $5,000. That's an extreme example.

THE WITNESS: Yes, sir.

THE COURT: You ascertained that it was 50 percent complete. Therefore, you would submit vouchers totalling $40,000, wouldn't you, even though it had only cost you say, $5,000?

THE WITNESS: In that extreme example, yes, that's what would have happened, but it never occurred, because that is very extreme.

THE COURT: But that was your theory?

THE WITNESS: That's right.

THE COURT: That if your ceiling was $80,000, and you could do it for five when it was 50 percent completed, you were entitled to $40,000?

THE WITNESS: Yes. Conversely, if it were $80,000, but it took us $186,000 to do it, and we had already expended $80,000 of effort into it, we only charged $40,000.

THE COURT: If 40 was your ceiling?

THE WITNESS: No. no—50 percent complete, remember, that is just the other side of the coin. The coin always had another side. We had hundreds of tasks and some of them had as many as 20 and 30 subtasks and we were dealing with literally thousands of fixed-price items over a ten-year period.

THE COURT: Even if you had to transfer fictitious hours, you would do it to get your 50 percent up to $40,000, wouldn't you?

THE WITNESS: Or down to $40,000, yes, sir.

THE COURT: Still again, using my example, if your ceiling was 80, and your maximum cost was five, for the time and material, when you were 50 percent through and say, had only expended $2,500 in time and material, you would add enough hours to that to add up to $40,000?

Defendant testified that this approach to billing for the MERDC tasks furthered a legitimate business purpose because these tasks were experiments which could not be performed efficiently if they were delayed pending receipt of additional funding each time a cost overrun occurred. When

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THE WITNESS: That's right, but that would never occur, because the engineer—.

THE COURT: (Interposing) But that's the theory on which you operate?

THE WITNESS: That's right. And conversely, if I could say it again, if it were $80,000, and we were half finished but we had expended the full $80,000, it would not show up. It would only show as $40,000.

Now, we just weren't that grossly erroneous. You know, the guys had years of experience. Our people knew what they were doing. And the government engineers knew what they were doing. So we oscillate maybe 10, 15, 20 percent around the number.

THE COURT: Do you say the government knew that you were putting in fictitious hours—?

THE WITNESS: No sir.

THE COURT: —to up that, in my hypothetical, from $2,500 to $40,000?

THE WITNESS: No. I would say the government knew we were fixed pricing every task. There is two ways to do it. If you're really smart and you're well organized, and you're not growing like we were, perhaps what you could do is go out, get your weekly IBM run, that's why we had the machine, but were trying to get ahead of the thing and see if we could tell a person what to charge to, so as to reflect the amount of work done and that's what's done in a lot of time and material contracts now, when you have the information.

We just didn't have the information that ready. We had too many tasks, too few people. And we were always behind the power curve. That was the time the Vietnam War was really heating up and all of that work was dumping down on us.

• • • • •

cost overruns did occur, GEC would not get additional contracts and the government would not get fair value for its money.[2] Consistent with this defense, he claimed he knew employees were adjusting hours on their time sheets to prevent cost overruns and delays in their work. One GEC project manager testified that he charged hours on his own time sheets which were actually spent working on MERDC tasks to "fixed-price" contracts in order to prevent cost overruns and delays in completion of those "fixed-price" contracts pending GEC's request for additional funding. Defendant testified that he was aware that some hours were shifted away from MERDC contracts and he wanted to shift them back "to make it come out even." Therefore, in all, he contended that he would have the MERDC tasks billed on the basis of his personal estimations of the percentage each task was completed rather than on the amount of labor employed as shown on the employees' time sheets.

The primary issue presented in this appeal is whether the intent essential for conviction under § 287 is limited to an intent to defraud. This statute reads as follows:

> Whoever makes or presents to any person or officer in the civil, military, or naval service of the United States, or to any department or agency thereof, any

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[2] In his words, if one billed on an hourly basis,

> ". . . in the testing business, you wouldn't get any testing done and you certainly wouldn't get it done very efficiently.
>
> You can't run a test program and go bang up against the task, run out of money and stop. Everybody . . . goes to other work and then wait a month, two months . . . sometimes three months—then go find your equipment again, hook it back up again and start over again.
>
> You can do that, but you're not going to do it very efficiently. Remember, if we didn't do a good service, if we didn't do good work, we didn't get any work the next time, so we were really interested in giving the government good value for the dollar. That's why we did it."

> claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

18 U.S.C. § 287. The court instructed the jury that, in addition to proving the defendant knowingly caused false claims to be made to the government, the government had to prove beyond a reasonable doubt that the defendant acted "willfully," that is, with either a consciousness that he was doing something wrong or with a specific intent to violate the law. In his closing argument, counsel for defendant argued to the jury that the government had to prove the defendant acted with a specific intent to defraud the government in order for the defendant to be found guilty. The court refused to define criminal intent in terms of intent to defraud and instructed the jury on intent, in pertinent part, as follows:

> . . . It is sufficient if one . . . [claim in each count] . . . is false or fraudulent or fictitious, provided, of course, that in order to convict the defendant, it must be shown as to that item that he had knowledge of its falsity or fraudulent character or fictitious character, and that he acted willfully.
>
> The defendant . . . asserts that he acted innocently and for a legitimate business purpose, with no specific intent to do what the law forbids.
>
> If, of course, the government has not proven beyond a reasonable doubt that he acted with specific intent, that is, willfully, then he cannot be convicted.
>
> In this regard, however, you are told that if the contract was a time and material contract, even with a ceiling, then the contractor . . . had no right to put on or cause to be put on a voucher, a claim for payment

> for work that he knew had not been done or put on such a voucher a claim for payment with reckless indifference as to whether the work had been done or not, that is, or whether the claim was true or false.
>
> However, even if this is shown, the defendant of course cannot be convicted unless it is shown that he acted with a specific intent, as that term . . . will be defined for you . . . .
>
> You heard reference during the closing argument to whether the government got its money's worth. Whether the government got its money's worth or not on these contracts is not the issue in this case. And that is no defense to any count if the claim referred to in that count, as submitted, was false or fraudulent or fictitious, and acted willfully.
>
> As indicated before, the crime charged in this case requires proof of specific intent before the defendant can be convicted. Specific intent, as that term implies, means more than the general intent to commit the act.
>
> To establish specific intent, the government must prove the defendant knowingly did an act which the law forbids, purposely intending to violate the law. Such intent may be determined from all the facts and circumstances surrounding the case. And intent ordinarily may not be proved directly, because there is no way of fathoming or scrutinizing the operations of the human mind, but you may infer the defendant's intent from the surrounding circumstances.

Two hours after it began deliberations, the jury requested further instruction on whether "criminal intent to defraud was a primary consideration for guilt or innocence." Then the court instructed the jury, in pertinent part, as follows:

> Criminal intent to defraud may or may not be a primary consideration for guilt or innocence. You will

recall that the act that the defendant is charged with violating is the submitting of a claim, knowing the claim to have been false or fraudulent or fictitious.

Now, as an overall proposition, whether any one or all of those you find to be the case here, whether the claim was false or fraudulent or fictitious, the defendant, to be convicted, must be found to have had the specific intent to violate the law.

That is, he must have had a consciousness that what he was doing was wrong. Whether it is specific intent to defraud is not necessarily the only consideration, but he must have had the specific intent to do something he knew the law forbade.

That is, he must have had a consciousness that what he did was wrong, or he must have acted—well—yes, the specific intent is the specific intent to do something the law forbids.

Now, that may or may not be fraud. Fraud is only one of the three things he may have had a consciousness of what he was doing and what was going on. It could be false, as the term is defined for you, and fraudulent, as that term was defined for you, or fictitious.

Then the court read § 287 in its entirety to the jury.

Therefore, on the issue of criminal intent, we hold the court properly instructed the jury that § 287 may be violated by the submission of a false claim, a fictitious claim or a fraudulent claim, if, in each instance, the defendant acted with knowledge that the claim was false or fictitious or fraudulent and with a consciousness that he was either doing something which was wrong, *see United States* v. *Bishop*, 412 U.S. 346, 93 S.Ct. 2008, 36 L.Ed.2d 941 (1973) or which violated the law, *see United States* v. *Moylan*, 417 F.2d 1002 (4th Cir. 1969), cert. denied, 397 U.S. 910, 90 S.Ct. 908, 25 L.Ed.2d 91 (1970).

The defendant contends that the court committed error in refusing to instruct the jury that the intent essential for conviction under § 287 is limited to a specific intent to defraud the government. The instructions proffered by defendant on his theory of defense, which the court refused to give, implied that unless the jury found that in submitting the false claims the defendant acted with a purpose to either cheat the government or to unjustly benefit himself or his company, he should be found innocent. We disagree for three reasons.

First, we do not find that the statute specifies an intent to defraud as an element to be proved under § 287. The language of the statute states the terms, "false, fictitious or fraudulent," in the disjunctive, and we interpret this to mean that three kinds of claims may be submitted in violation of § 287 and not merely claims which are fraudulent. *Compare United States* v. *Snider*, 502 F.2d 645 (4th Cir. 1974) *with United States* v. *Cooperative Grain and Supply Co.*, 476 F.2d 47 (8th Cir. 1973). The statute is silent on motive and criminal intent and only specifies that the claims be submitted with a knowledge that they are false, fictitious or fraudulent.

Second, in applying general principles of criminal law, the court added the element of "willfulness" or criminal intent to the requirements of the government's case, and we think correctly refused to define criminal intent under § 287 solely in terms of purpose or motive. Criminal intent may be proved either by a showing that the defendant acted for a specific purpose to violate the law or that he acted with an awareness that what he was doing was morally wrong, whether or not he had actual knowledge that he was doing something that the law forbids. Proof of motive is relevant on the issue of criminal intent but is not determinative of it. The defendant could have formed the requisite criminal intent by acting with a consciousness that he was doing something wrong while pursuing a legitimate business goal, or he could have been aware of the prohibi-

tions of the False Claims Act and could have chosen to pursue his business goals in spite of those prohibitions hoping that his illegal acts would not be discovered. Whether or not the defendant formed such a criminal intent is a question for the trier of fact. At defendant's trial, the jury was instructed that criminal intent essential for conviction under § 287 could be proved by either a showing that the defendant was aware that he was doing something wrong or that he acted with a specific intent to violate the law. After hearing the defendant's evidence, his counsel's arguments and the court's reference to his theory of defense in its initial instruction on criminal intent, the jury returned a verdict of guilty. Based upon the evidence of record, we think the jury was justified in finding the defendant acted with a criminal intent. He admitted having the bookkeeper alter company records which substantiated the false claims at issue, and he admitted causing her to trace employees' signatures on those altered records without their consent or knowledge. Whether or not the jury chose to credit defendant's claims of good or justifiable motive, we think such attempts to substantiate the false claims constitute good evidence of the requisite criminal intent to be proved under § 287.

Third, we think that § 287 does not require proof of a specific intent to defraud, as defendant defines that term, because the purpose of § 287 will not be furthered by limiting criminal prosecutions to instances where the defendant is motivated solely by an intent to cheat the government or to gain an unjust benefit. The plain purpose of § 287 is to assure the integrity of claims and vouchers submitted to the government. Federal criminal statutes written in language similar to § 287 which have specified intent to defraud as an element to be proved have been interpreted to require only proof that the defendant acted "for the purpose of impairing, obstructing, or defeating" a lawful function of the government. *Pina v. United States,* 165 F.2d 890, 893 (9th Cir. 1948). In *Pina,* it was held as well-settled,

that "the contemplated infliction of a monetary loss upon the Government is not a necessary ingredient of an intent to defraud the United States." 165 F.2d at 893. Such an interpretation is consistent with common law, in that, a common law prosecution for forging or for uttering a false writing could not be defended by a showing that the defendant's purpose was only to use the false writing as a device to collect a bona fide debt. R. Perkins, *Criminal Law* 303-307 (1st Ed. 1957).

The defendant supports his contention that intent to defraud is essential for conviction under § 287 by arguing that in some jurisdictions specific intent to defraud is essential to give rise to civil penalties under 31 U.S.C. § 231, a civil penalty statute stated in part in language similar to § 287, and by asserting that the element of material falsity imports a requirement of an intent to defraud under our holding in *United States v. Snider, supra.* We find no merit in either of these arguments. Unlike § 231, §287 requires proof of a criminal act, rather than proof of a civil wrong. *See generally, United States v. Miller,* 545 F.2d 1204, 1213 (9th Cir. 1976). Under § 287, the government must prove beyond a reasonable doubt that the defendant performed forbidden acts with a criminal intent. The prohibition of the statute is absolute in that the defendant's liberty is at stake. Under § 231, the government is empowered to enforce the underlying civil duty to submit to the government only valid claims for payment by bringing an action for imposition of civil penalties. The nature of the proceedings, the standards of proof, and the defendant's interests at stake are wholly different under these two statutes, and in construing § 287 we do not find either authority or persuasion in defendant's analogy to § 231.[3] Also, we do

[3] Likewise, we note that under § 231 there is a split of authority on the issue of whether a specific intent to defraud must be proved by the government in order to maintain its actions under that civil statute, and we expressly disclaim any implication in our holding today that such an intent is or is not required as an element of proof under § 231.

not think that our holding in *United States v. Snider, supra,* supports defendant's contention. In that case we were construing a criminal tax fraud statute and held that in order for a taxpayer to be convicted of supplying "false or fraudulent" information, the information must either be supplied with an intent to deceive *or* be of such a nature that it could reasonably affect withholding to the detriment of the government. 502 F.2d at 655.

Finally, defendant has raised as an issue in this appeal, the court's refusal to give the defendant's proffered instructions which summarized the evidence of his theory of defense. We think the court properly refused to give these instructions because they were contrary to law as previously stated. Furthermore, because the court included the defendant's claims of good or justifiable motive in its initial instructions on the issue of criminal intent and because the jury apparently gave considerable weight to this defense in its deliberation on that issue as indicated by its inquiry to the court regarding "criminal intent to defraud", we can find no merit, in fact, to defendant's objection on this ground.

Therefore, judgment of conviction is

AFFIRMED.

APPENDIX B

[Caption deleted in printing]

Filed September 22, 1978

Order

Upon consideration of the appellant's petition for rehearing and suggestion for rehearing en banc, and no judge having requested a poll on the suggestion for rehearing en banc,

It is ADJUDGED and ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge Hall for a panel consisting of Judge Butzner, Judge Hall, and Judge Northrop.

For the Court,

/s/ WILLIAM K. SLATE, II
Clerk

APPENDIX C

Constitutional and Statutory Provisions Involved

CONSTITUTION: FIFTH AMENDMENT

The Fifth Amendment to the United States Constitution reads as follows:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or properly, without due process of law; nor shall private property be taken for public use, without just compensation."

STATUTE: 18 U.S.C. § 287

> "Whoever makes or presents to any person or officer in the civil, military, or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent, shall be fined not more than $10,000 or imprisoned not more than five years, or both."
>
> June 25, 1948, c. 645, 62 Stat. 698.

STATUTE: 31 U.S.C. § 231

> Any person not in the military or naval forces of the United States, or in the militia called into or actually employed in the service of the United States, who shall make or cause to be made, or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent, or who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, or who enters into any agreement, combination, or conspiracy to defraud the Government of the United States, or any department or officer thereof, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim, or who, having charge, possession, custody, or control of any money or other public property used or to be used in the military or naval service, who, with intent to defraud the United States or willfully to conceal such money or other property, delivers or causes to be delivered, to any other person having authority to receive the same, any amount of such money or other property less than that for which he received a certificate or took a receipt, and every person authorized to make or deliver any certificate, voucher, receipt, or other paper certifying the receipt of arms, ammunition, provisions, clothing, or other property so used or to be used, who makes or delivers the same to any other person without a full knowledge of the truth of the facts stated therein, and with intent to defraud the United States, and every person who knowingly purchases or receives in pledge for any obligation or indebtedness from any soldier, officer, sailor, or other person called into or employed in the military or naval service any arms, equipments, ammunition, clothes, military stores, or other public property, such soldier, sailor, officer, or other person not having the lawful right to pledge or sell the same, shall forfeit and pay to the United States the sum of $2,000, and, in

addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit; and such forfeiture and damages shall be sued for in the same suit.

R.S. § 3490, 5438.

However, since Title 31 has not been enacted into positive law, the official text of the statute is that which appears in the Revised Statutes, §§ 3490-3494, 5438. The relevant portions of these statutes are as follows:

§ 3490:

§ 3490. "Any person not in the military or naval forces of the United States or in the militia called into or actually employed in the service of the United States, who shall do or commit any of the acts prohibited by any of the provisions of section fifty-four hundred and thirty-eight, Title 'CRIMES,' shall forfeit and pay to the United States the sum of two thousand dollars, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit; and such forfeiture and damages shall be sued for in the same suit."

§ 5438:

§ 5438. "Every person who makes or causes to be made, or presents or causes to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent, or who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses, or causes to be made or used, any false bill, receipt,

voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, or who enters into any agreement, combination, or conspiracy to defraud the Government of the United States, or any department or officer thereof, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim, or who, having charge, possession, custody, or control of any money or other public property used or to be used in the military or naval service, who, with intent to defraud the United States or willfully to conceal such money or other property, delivers or causes to be delivered, to any other person having authority to receive the same, any amount of such money or other property less than that for which he received a certificate or took a receipt, and every person authorized to make or deliver any certificate, voucher, receipt, or other paper certifying the receipt of arms, ammunition, provisions, clothing, or other property so used or to be used, who makes or delivers the same to any other person without a full knowledge of the truth of the facts stated therein, and with intent to defraud the United States, and every person who knowingly purchases or receives in pledge for any obligation or indebtedness from any soldier, officer, sailor, or other person called into or employed in the military or naval service any arms, equipments, ammunition, clothes, military stores, or other public property, such soldier, sailor, officer, or other person not having the lawful right to pledge or sell the same, every person so offending in any of the matters set forth in this section shall be imprisoned at hard labor for not less than one nor more than five years, or fined not less than one thousand nor more than five thousand dollars."

No. 78-675

In the Supreme Court of the United States

OCTOBER TERM, 1978

ALVIN MICHAEL MAHER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 582 F.2d 842.

JURISDICTION

The judgment of the court of appeals was entered on August 23, 1978. A petition for rehearing was denied on September 22, 1978 (Pet. App. 15a). The petition for a writ of certiorari was filed on October

20, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in a prosecution under the False Claims Act (18 U.S.C. 287) of a federal contractor who knew his claims for payment were overstated and who knew his presentation of such claims was prohibited, the government must prove that the contractor lacked any legitimate business or other reason for the misrepresentation.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Virginia, petitioner was convicted on 11 counts of filing false, fictitious, or fraudulent claims with the United States government, in violation of 18 U.S.C. 287. He was sentenced to concurrent terms of three years' imprisonment on each count. The court of appeals affirmed (Pet. App. 1a-14a).

The evidence showed that in 1972 General Environments Corporation ("GEC"), which tested equipment and conducted experiments for various commercial and government clients, entered into various "time and materials" contracts with the Mobility Equipment Research and Development Center ("MERDC") of the Department of the Army at Fort Belvoir, Virginia. Under these contracts, GEC agreed to perform experiments for a price not to exceed a certain amount and to bill periodically on the basis of the amount of labor and materials actually employed in

the experiments up to the date of billing. GEC billed MERDC monthly for its work, with the hourly rate varying according to the classification of labor utilized for each experiment; the hourly rate also included GEC's overhead and profit. The monthly billings were prepared by the company bookkeeper based on time sheets that were filled out and signed by the GEC employees who worked on the MERDC contracts (Tr. 32-36, 39-41, 58-60).

In 1972, petitioner was promoted from vice-president to president of GEC. In both of these capacities, petitioner had primary and final responsibility for billing on the MERDC contracts (Tr. 59-60, 92). Accordingly, the bookkeeper submitted all MERDC billings to petitioner for his approval prior to their submission to MERDC. Whenever the bookkeeper did so, petitioner instructed her to change them to reflect more hours than were shown on the employees' time sheets. She made the billing changes that he specified, prepared new time sheets to conform to those billing changes, traced over the employees' signatures on the new time sheets, and destroyed the original ones. Petitioner told her these changes were necessary because the employees did not know to which contract they should charge their hours and that their signatures had to be traced because there was insufficient time to have the employees sign the revised time sheets (Tr. 86-110, 120-125). Three GEC project managers, whose time sheets had been altered, testified that, in fact, they knew on which contracts they were working and that they recorded hours on their time sheets

according to time spent working on those contracts. They said they were never told that they made errors on their time sheets (Tr. 130-137, 138-145, 150-154). Approximately 5,300 fictitious hours, representing $68,000 in false claims, were billed on the MERDC contracts as a result of petitioner's instructions to the bookkeeper (Tr. 187, 192).

At trial, petitioner admitted instructing the bookkeeper to alter the time sheets but maintained that he was innocent because he acted for a legitimate business purpose and without a motive to defraud the government. Essentially his theory of defense was that while he knew the MERDC contracts were to be paid at an hourly rate for work actually performed, he nevertheless thought they should be billed as "fixed-price" contracts, since the contracts provided for a dollar ceiling. Thus, by his own admission, using the ceiling as his basis, he measured what the government should be charged according to what he, himself, estimated the percentage of completion on a job to be regardless of the amount of labor actually employed (Tr. 257-258, 263, 270-272, 274-275).[1]

[1] In other words, if petitioner considered work on a MERDC task to be one-half complete, he would have the bookkeeper bill one half of the maximum price allocated to that task regardless of the amount of labor actually employed. Thus, if he had a task with a ceiling of $80,000 and found it to be 50% complete, he would charge $40,000 even if the labor actually employed amounted to only $5,000 (Tr. 277-280).

ARGUMENT

1. Petitioner does not deny that he knew the claims were false when he submitted them for payment to the government. Nor does he deny that he knew such claims were prohibited. As to these elements of the offense, there is no question that the judge correctly instructed the jury.[2]

Petitioner contends that the court should also have instructed that the offense requires a finding that petitioner intended to defraud the government. 18 U.S.C. 287, however, contains no express scienter requirement beyond knowledge of the inaccuracy of the claim and consciousness that its submission is prohibited:

> Whoever makes or presents to any person or officer * * * of the United States * * * any claim * * *, knowing such claim to be false, fictitious, or fraudulent, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Petitioner offers no persuasive reason for disregarding the statutory language and engrafting a further scienter requirement onto the statute. Petitioner's contention that *Morissette* v. *United States*, 342 U.S. 246 (1952), requires a specific intent to deceive serves only to confirm the decision below. In *Morissette* a deer hunter found and took spent bomb casings on a practice bombing range also used for hunting deer. He was convicted for converting gov-

[2] See Pet. App. 8a-10a.

ernment property. This Court reversed the conviction because Morissette believed that the property had been abandoned and that it was lawful to take the casings. This Court reasoned that mens rea was a necessary element of all federal crimes that derived from the infamous common law crimes. In sharp contrast, petitioner was convicted precisely because he did know that the claims were inaccurate and he was aware that it was wrong to submit such claims. *Morissette* offers petitioner no further protection than he has already received.

Nor is there any merit in petitioner's argument that due process requires that criminal statutes be strictly construed. Petitioner can hardly claim that he was given inadequate notice that his actions were unlawful, since the jury found that petitioner was conscious that his actions were prohibited. Petitioner may not challenge the statute, which in any event is plain enough on its face, on the ground that someone else might receive inadequate notice. *United States* v. *Powell*, 423 U.S. 87, 92 (1975); *United States* v. *Mazurie*, 419 U.S. 544, 550 (1975).

Petitioner's contention that at common law fraud required an intent to cheat is premised on the erroneous assumption that the statute comprehends only common law fraud. As the court of appeals noted, the statute prohibits claims that are either "false, fictitious *or* fraudulent" (Pet. App. 11a). Even if "fraudulent" claims would be measured by common law criteria, the court correctly held that the statute is violated when the claim is either fictitious or false

(*ibid.*). The purpose of the statute is to assure the integrity and veracity of claims submitted to the government. As the court below held (Pet. App. 12a), that purpose would be substantially frustrated by preventing its application to persons such as petitioner who knowingly submit inaccurate claims with an awareness that it is wrong to do so.

2. Petitioner does not contend that the decision below is in conflict with the decision of any other circuit under 18 U.S.C. 287. Petitioner does, however, contend that the decision below conflicts with several lower court decisions stating that intent to deceive is an element of a violation of 31 U.S.C. 231. Section 231 in part authorizes the government to seek civil recovery and penalties from persons who submit false, fictitious or fraudulent claims to the government. None of the civil cases cited by petitioner, however, absolved any claimant who was aware that its claim was false—with the arguable exception of *United States* v. *Park Motors*, 107 F. Supp. 168 (E.D. Tenn. 1952).[3] In that case, a statute authorized fed-

[3] While it is true that dicta in some of the other cases cited by petitioner state that an element of the civil offense is an intent to deceive, their actual holdings are fully consistent with the opinion below. Most of the cited decisions held that the claimant lacked any knowledge at all that the claim was false, fictitious, or fraudulent and therefore there was no liability. *United States* v. *Ekelman & Associates*, 532 F.2d 545, 548-549 (6th Cir. 1976); *United States* v. *Mead*, 426 F.2d 118, 122-124 (9th Cir. 1970); *United States* v. *Priola*, 272 F.2d 589, 593-594 (5th Cir. 1959); *United States* v. *Lazy F C Ranch*, 324 F. Supp. 698, 700 (D. Idaho 1971); *United States* v. *Sawn*, 243 F. Supp. 744 (S.D. Iowa 1965); *United States*

eral financial assistance for certain disabled veterans in purchasing automobiles priced less than $1600. Certain veterans desired automobiles at about $1700. The government paid approximately $1600 and the veterans paid the difference. A government employee advised the dealer that the law permitted such separate billings. In the course of obtaining the federal payment, therefore, the dealer in question submitted a certificate to the government stating that the sales price was less than $1600, when in fact it knew that the total sales price was about $1700. The verification was not used to obtain something from the gov-

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v. *Hangar One, Inc.*, 406 F. Supp. 60, 64, 139-145 (N.D. Ala. 1975). In two other cases claimants had not misstated any facts but had stated exaggerated conclusions based on the facts. In both cases, however, the claimants supplied the underlying factual information, or it was otherwise known to the agency, so the agency could draw its own conclusion; the submission, therefore, was not misleading factually. *United States* v. *Schmidt*, 204 F. Supp. 540, 542 (E.D. Wis. 1962); *United States* v. *Goldberg*, 158 F. Supp. 544, 548 (E.D. Pa. 1958). Finally, two of the cases equated an intent to deceive with awareness of and concealment of the discrepancy between the claim and the truth. In *United States* v. *Aerodex, Inc.*, 469 F.2d 1003 (5th Cir. 1972), for example, a government contract or substituted another type of ball bearing for the type it had agreed to supply. The court dismissed the contention that the contractor in good faith believed the substitutes to be just as good as the specified ones. Since the contractor deliberately mislabelled the bearings to conceal the discrepancy, the court held that the only possible conclusion was that the claimant had intended to deceive the government. Accord: *United States* v. *National Wholesalers*, 236 F.2d 944, 950 (9th Cir. 1956). In sum, none of these cases absolved any claimant from liability where the claimant knew its claim was inaccurate and knew that it was wrong to submit it.

ernment to which the dealer was not entitled. In sharp contrast, petitioner was conscious that he was asking for more compensation than his company was entitled to receive.

Nor is *United States* v. *Snider*, 502 F.2d 645 (4th Cir. 1974), in conflict with the decision below. That case considered the scienter requirements for conviction under 26 U.S.C. 7205, which prohibits employees from supplying false or fraudulent tax information to their employers. The court of appeals held that the scienter requirements of Section 7205 are satisfied if the inaccurate information supplied is either supplied with an intent to deceive *or* is of "such a nature that it could reasonably affect withholding to the detriment of the government" (502 F.2d at 655). By analogy, petitioner's misrepresentations were of such a nature that they could reasonably be expected to lead to government payments greater than those required. Petitioner does not contend that he could have escaped liability under this definition of false or fraudulent adopted for purposes of Section 7205.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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